IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ELOUISE PEPION COBELL, et al.,	)	
	)	No. 1:96CV01285
Plaintiffs,	)	(Judge Lamberth)
v.	)	
	)	
GALE A. NORTON, Secretary of the Interior, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO REQUIRE DEFENDANTS TO GIVE THEIR BENEFICIARIES NOTICE OF DEFENDANTS' CONTINUING INABILITY OR REFUSAL TO DISCHARGE THEIR FIDUCIARY DUTIES

BACKGROUND

On February 4, 1997, the Court certified under Federal Rule of Civil Procedure 23(b)(1)(A) and (b)(2), "a plaintiff class consisting of present and former beneficiaries of Individual Indian Money accounts." Order of February 4, 1997 at 2-3. Notice of the certification decision and the nature of the relief requested in the litigation was neither requested nor sent to the absent class members. On December 21, 1999, the Court entered its Phase 1 judgment in favor of the Plaintiffs. Notice of this opinion was neither requested nor sent to the absent class members. On February 23, 2001, the Court of Appeals largely affirmed the Phase 1 judgment. Notice of the Court of Appeals' decision was neither requested nor sent to the absent class members. On September 17, 2002, the Court held the Secretary of the Interior in contempt and scheduled the Phase 1.5 trial. Notice of this opinion – or the Court of Appeals' later opinion vacating the contempt finding – was neither requested nor sent to the absent class members. On September 25, 2003, the Court entered its structural injunction against Defendants for the Phase

1.5 trial, identifying numerous trust obligations and requirements for Defendants to follow. Notice of this order was neither requested nor sent to the absent class members.

On October 27, 2004, almost eight years after certification of the class, when no significant event in this litigation has recently occurred, Plaintiffs filed their Motion to Require Defendants to Give Their Beneficiaries Notice of Defendants' Continuing Inability or Refusal to Discharge Their Fiduciary Duties ("Motion"). The notice that Plaintiffs ask the Court to approve in their Motion ("Proposed Notice") contains disputed facts about issues that are currently on appeal. According to the Motion, the Proposed Notice would only be attached to ordinary course of business communications and thus would not be sent to all of the class members. Plaintiffs also request that Defendants disseminate – and pay the costs of disseminating – the Proposed Notice.

The Proposed Notice is the wrong notice at the wrong time to the wrong group of recipients paid for, and sent out, by the wrong party. The Court should deny the Motion.

ARGUMENT

I. PLAINTIFFS' PROPOSED NOTICE IS IMPROPER

A. The Timing of the Proposed Notice is Inappropriate

As Plaintiffs acknowledge, notice is not required for a class that is certified under Federal Rule of Civil Procedure 23(b)(2), as is this one. See Motion at 21 n.18. The only exceptions are that Rule 23(e)(1)(B) requires notice regarding settlement or dismissal and Rule 23(h)(1) requires notice regarding an attorney fee request by class counsel. Although Plaintiffs have recently filed

an interim request for almost $15 million in attorney fees, the Motion does not request notice of a proposed settlement or dismissal of the case, or counsel's fee request.[1]

In the absence of required notice, the only question in Rule 23(b)(2) cases is whether a court should exercise its discretion under Rule 23(d)(2) and order notice for "the protection of the members of the class or otherwise for the fair conduct of the action." Fed. R. Civ. P. 23(d)(2). "In most cases, however, 'notice would add little or nothing.'" Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 257 (3d Cir. 1975) (quoting 3B J. Moore, Federal Practice ¶ 23.07(1) (2d ed. 1974)). The Advisory Committee Note for Rule 23(d) cautions that "[i]n the degree that there is cohesiveness or unity in the class and the representation is effective, the need for notice to the class will tend toward a minimum." Fed. R. Civ. P. 23(d) Advisory Committee Notes. The D.C. Circuit has suggested that in a Rule 23(b)(1) or (b)(2) case, "[a]t best, then, notice provides absent [class] members with an opportunity to monitor the representation of their rights." Larionoff v. United States, 533 F.2d 1167, 1186 (D.C. Cir. 1976).

Plaintiffs did not request that notice of this case, or the claims at issue, be sent to the absent class members when the class was certified, or since.[2] Plaintiffs do not explain in their

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[1/] As discussed in Section II below, if the Court decides that a notice should be sent to the class members at this time, any such notice should include the Rule 23(h) information about Plaintiffs' interim attorney fee motion.

[2/] At the request of Plaintiffs, the Court provided an "opt-in" opportunity for IIM account holders "who prior to the filing of the Complaint herein had filed actions on their own behalf alleging claims included in the Complaint." Order of February 4, 1997 at 3. These account holders could "elect to join the Class by filing notice of such election with the Court and serving the same upon counsel for the parties." Id. Defendants are unaware of any such IIM account holders electing to join the class. Perhaps this is because they never received notice of their opportunity to do so. If Plaintiffs' oft-expressed view that this litigation includes virtually all matters related to the IIM trust were correct, the subset of IIM account holders who are not part of the class because they never elected to opt-in would include virtually any IIM account holder who ever filed suit against

Motion why, after nearly eight years of silence on all of the significant events in this case, a "mid-litigation, informational notice," Motion at 15 n.11, is urgently needed now. Other than the attorney fee motion, it is difficult to conceive of any recent event in the litigation of which the absent class members might desire to be informed or which would require any action by the absent class members to protect their rights in this case.

As revealed in the Motion and Proposed Notice, Plaintiffs do not really seek to communicate with the class members and give them a somewhat tardy mid-litigation update on the status of the case and the right to consult with class counsel. Rather, they seek to gain additional, previously unrequested substantive relief in the case under the guise of a notice to the class members.

Plaintiffs now seek to have the Court recognize a novel new trust duty – the duty to notify beneficiaries that a trustee has breached its trust duties (even where the issue of breach is still in dispute). They then seek to have the Court find Defendants in breach of this new trust duty. Finally, they seek, as a remedy, to require Defendants to send the Proposed Notice informing the class members of this supposed breach.

Plaintiffs do not rely primarily on Rule 23(d) as support for the Court's authority to grant them this new substantive relief. They start by vaguely asserting that the American Indian Trust Reform Act of 1994 somehow gives the Court the power to order such relief, but they do not include any supporting argument – other than to sprinkle the bold feature from their word processor on various words, seemingly at random, in the portion of the statute reproduced in their Motion. See Motion at 10 n.5. Perhaps recognizing the paucity of statutory authority, Plaintiffs

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Interior prior to June 10, 1996, when the Complaint was filed.

rely mainly on the "inherent" authority of the Court, "sitting as a chancellor in equity," Motion at 7, to grant them the requested substantive relief. See Motion at 7-11.

What Plaintiffs ignore is that the substantive relief they request now in their Motion is inextricably intertwined with the relief requested, and granted, in the Phase 1.5 trial. The Court described at considerable length in its September 25, 2003 Phase 1.5 opinion the various trust duties that it believed were applicable to the Defendants. The Court also provided for the appointment of a "Judicial Monitor" with oversight powers similar to those of the "special property advisor" appointed in Republic of the Phillipines v. New York Land Co., 852 F.2d 33 (2d Cir. 1988), the principal case cited in the Motion as authority for the Court to use its powers as a chancellor in equity to grant Plaintiffs their requested substantive relief.[3] Nowhere, however, did the Court address, much less identify, the duty to notify beneficiaries of supposed breaches of trust obligations in its September 25, 2003 opinion or structural injunction. Nowhere in the Court's structural injunction did the Court order Defendants "to notify Beneficiaries of their rights and remedies and the inaccuracy and unreliability of the information routinely distributed to Beneficiaries." Motion at 4.

The time for Plaintiffs to request the notification duty they now seek was during the Phase 1.5 trial. Plaintiffs said nothing in the plans they submitted for Phase 1.5 and never mentioned such a duty during the lengthy Phase 1.5 proceedings. After the Court's September 25, 2003 opinion and structural injunction were issued, they elected not to appeal the absence of any such trust obligation on Defendants. Plaintiffs cannot now ask the Court to find such an

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[3/] As discussed in Defendants' briefs on appeal, Defendants do not concede that the Court has the authority in this case to establish a Judicial Monitor or a special property advisor or a receiver over a co-equal branch of the government.

obligation, find Defendants in breach of such an obligation, and order a notice sent, all without a trial.

The parties are vigorously disputing the nature of this Court's jurisdiction and authority to use the type of inherent equitable powers available to a "chancellor" in equity in the current appeals of the Phase 1.5 structural injunction and the IT preliminary injunction. The nature of applicable fiduciary duties and the consequences for breach of such duties are also on appeal. It is thus inappropriate for the Court to order a notice now of the type requested by Plaintiffs. The Court either has no power to order dissemination of the Proposed Notice because it involves matters on appeal – in which case the Court is deprived of jurisdiction – or, even if the Court retains jurisdiction, it would be imprudent to send a notice now to class members regarding trust obligations when any such information may prove misleading or confusing depending upon how the Court of Appeals rules.

B. The Content of the Proposed Notice Is Inappropriate

Plaintiffs have not identified a valid purpose for dissemination of their Proposed Notice to absent class members now. If the Court concludes, however, that notice should be sent, much of the language in the Proposed Notice is improper. Plaintiffs included strikingly similar language in their proposed language for the land sales notice. See Cobell v. Norton, No 96-1285, 2004 WL 2377222, at *14-15 (D.D.C. Oct. 22, 2004). The Court rejected this language because "several of the assertions in the plaintiffs' proposed notice are disputed matters currently pending before the Court of Appeals." Id. at *16.

As discussed above, notice to Rule 23(b)(2) class members at this stage of the litigation is unnecessary, but if any notice is sent its content should be limited to those elements included in

the Court's October 22, 2004 Memorandum Opinion and Order.[4] Thus any notice should only inform class members "of the existence of this litigation, of their potential class membership, and of their right to consult with class counsel . . . ." Cobell, 2004 WL 2377222 at *16.

C. The Subclass of Recipients of the Proposed Notice Is Inappropriate

In their Motion, Plaintiffs claim that their Proposed Notice is needed now to prevent irreparable harm and "to protect class members' rights." Motion at 9. The "rights" that Plaintiffs claim are at risk of being violated if class members do not receive the Proposed Notice are the "rights" of IIM beneficiaries to have accurate trust information before they "make critical decisions about their trust property based on information provided by the Department of Interior."[5] Motion at 1. Surprisingly, however, the examples provided by Plaintiffs in their Motion of the types of "critical decisions" that the beneficiaries should not have to make without notice are precisely the types of decisions that Plaintiffs already conceded during the land sales notice dispute were ones for which notice was not needed. Indeed, consistent with Plaintiffs' concessions, the Court found that – unlike sales transactions – prior notice was unnecessary for communications regarding:

> 1. Encumbrances, leasing, lease sales, permitting, rights-of-way, and timber sales of or on individually-owned Indian trust land; 2. The investment of trust funds in IIM accounts; 3. Estate planning, will drafting and the probate of or relating to Indian trust assets; 4. The surveying or appraisal of trust assets; 5. Title to trust

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[4] Defendants vigorously dispute the description of the IIM trust duties contained in the Proposed Notice, including any description which inaccurately states that the duties of the various Defendants are co-extensive.

[5] Plaintiffs are not seeking to protect the rights of the class members as litigants in this litigation, but rather are seeking to protect their rights in other circumstances (i.e., the right to make informed decisions in these other situations).

lands; 6. Ownership of trust funds or lands; or 7. Physical improvement or alteration of trust assets.

Cobell, 2004 WL 2377222, at *26.

In their Motion, however, Plaintiffs now claim that lease decisions, timber sales decisions, rights-of-way and easement decisions, decisions about whether to improve and alter land, and estate planning decisions are the very types of decisions where class members' rights are at risk absent prior notice. See Motion at 1. Moreover, under the scheme suggested by Plaintiffs in their Motion, the Proposed Notice would not be sent to all class members as a separate notice, but rather would only be included in all routine written communications between Defendants and the class members. See Motion at 2; proposed order attached to the Motion at 1.[6] In the Court's December 23, 2002 Memorandum Opinion and Order, these communications – ones that would take place even if the litigation did not exist – are described as ordinary course of business communications. See Cobell v. Norton, 212 F.R.D. 14, 22 (D.D.C. 2002). As discussed in that opinion and in the Court's September 29, 2004 Memorandum Opinion and Order regarding land sales, ordinary course of business communications by definition are communications where the rights of absent class members are not at risk.

Indeed, any written communication where the rights of a class member are at risk of being extinguished is already prohibited under the December 23, 2002 Order. Therefore, if the purpose of the Proposed Notice is to protect the rights of class members, and the only class

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[6] Including the Proposed Notice in "all" communications between Interior and the IIM beneficiaries without regard to the subject matter of the communication – as proposed by Plaintiffs in their Motion – would lead to the absurd result in which the Proposed Notice would be attached to communications regarding health care, education, and other topics that are obviously unrelated to the subject matter of this case.

members who would receive the Proposed Notice are those who are at risk of having their rights terminated, under the existing orders of the Court, the only class members who would receive the Proposed Notice are those who are receiving written communications regarding land sales or those who are receiving a statement of historical accounting, because these are the only situations identified thus far by the Court in which class member rights are at risk during communications with Defendants. But because the Court has already approved the form of notice to be included in these situations, there are no currently identified written communications where Plaintiffs' Proposed Notice would be included. To be sure, as the Court mentioned at the October 6, 2004 status hearing, there may be other types of communications where the Court will find that class members' rights are at risk, but Plaintiffs were supposed to bring them to the attention of the Court at the October 19, 2004 hearing. See Tr., Oct. 6, 2004 at 33:15-35:17. They did not identify any such circumstances on October 19, 2004 – indeed they conceded that all of the situations identified by the government (the so-called "items 2-8") were not covered by the December 23, 2002 Order – and have yet to bring any others to the attention of the Court. The types of communications discussed in their Motion have been explicitly recognized by the Court to be ones for which prior notice is not needed.

D. Administrative Expenses Associated with the Proposed Notice and the Burden of Sending It Out Should Be Borne by Plaintiffs

As Plaintiffs concede, the default rule is that the Representative Plaintiffs – or class counsel – should bear the cost and burden of sending out notice to the absent class members. See Motion at 13; see also Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 178-79 (1974); Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340 (1978); Dellums v. Powell, 566 F.2d 167, 174 n.4 (D.C. Cir. 1977). "As in all litigation, the plaintiff is obligated to pay litigation costs. Added costs, especially of notice to the class, are associated with the bringing of class actions in contrast to individual ones." 2 Alba Conte & Herbert B. Newberg, *Newberg on Class Actions*, § 5:26, at 449 (4th ed. 2002). "As a practical matter, counsel for the class most frequently advances all costs of class litigation on a contingency basis, so that the primary risks and exposure to larger litigation expenses will fall on the shoulders of class counsel, subject to potential reimbursement from a fee award if the litigation succeeds." Id.

Plaintiffs go to considerable lengths in their Motion to establish the unremarkable proposition that the Court retains discretion to shift all, or part, of the costs and burden of sending out notices under certain circumstances where such notices are needed to protect class member rights. See Motion at 12-21. Indeed, in each of the cases discussed by Plaintiffs, a notice was deemed necessary to protect the litigation rights of class members. For example, in Barahona-Gomez v. Reno, 167 F.3d 1228 (9th Cir. 1999), the certified class consisted of aliens who had qualified for a suspension of deportation, but the final adjudication had not yet occurred. 167 F.3d at 1233, supplemented by Barahona-Gomez v. Reno, 236 F.3d 1115 (9th Cir. 2001). A preliminary injunction was entered against the government, staying the deportation of all class

members who could be ordered deported after being denied suspension of deportation. 167 F.3d at 1233. The district court found that if the class members did not receive notice of their rights under the preliminary injunction they could be erroneously deported, which would terminate their rights as class members. Id. at 1236. Under those circumstances, and where there was no real burden to the government because it could easily attach the notice to any order sent to a class member denying his or her deportation suspension application, the Ninth Circuit concluded that it was not error to order the defendants to bear the costs of sending out the notice.

The other two cases cited by Plaintiffs, Kansas Hospital Association v. Whiteman, 167 F.R.D. 144 (D. Kan. 1996), and Peoples v. Wendover Funding, Inc., 179 F.R.D. 492 (D. Md. 1998), also involved required notices. Peoples involved a required opt-out notice for a Rule 23(b)(3) class certification. 179 F.R.D. at 502. Kansas Hospital involved a required Rule 23(e) notice of dismissal. 167 F.R.D. at 146.

Here, as discussed above, notice is unnecessary.[7] If, for whatever reason, Plaintiffs still want to send out a notice to the absent class members – and the content of such a notice is limited to appropriate language approved by the Court – Defendants do not object. Because notice is unnecessary, however, Plaintiffs should bear the costs and the burden of sending it. See, e.g., Arey v. Providence Hosp., 55 F.R.D. 62, 71 (D.D.C. 1972).

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[7] To the extent that Plaintiffs' counsel have properly represented the class, they should have already kept class members informed about the case and their rights as class members. They have made various appearances at conventions, put information on their website, hired a press agent, and taken other actions to inform absent class members about their rights.

II. IF NOTICE IS SENT OUT NOW IT SHOULD INCLUDE THE NOTICE OF PLAINTIFFS' ATTORNEY FEE REQUEST REQUIRED BY RULE 23(h)

On August 17, 2004, Plaintiffs filed their EAJA Petition for Interim Fees Through the Phase 1.0 Proceeding, seeking an award of $14,528,467.21. Under Rule 23(h)(1), notice of this fee request, together with an opportunity to object, must be directed to class members "in a reasonable manner." Fed. R. Civ. P. 23(h)(1). According to the Advisory Committee, "[b]ecause members of the class have an interest in the arrangements for payment of class counsel whether that payment comes from the class fund or is made directly by another party, notice is required in all instances." Fed. R. Civ. P. 23(h)(1) Advisory Committee Note (emphasis added).

If the Court exercises its discretion under Rule 23(d) and authorizes Plaintiffs to send out a notice at this time, any such notice should include the Rule 23(h)(1) attorney fee notification. Because the Rule 23(h)(1) notice was triggered by Plaintiffs' action (i.e. the filing of their interim attorney fee request), Plaintiffs should also bear the costs and burden of sending out this notice.

CONCLUSION

For these reasons, Plaintiffs' Motion should be denied.

Dated: November 10, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on November 10, 2004 the foregoing *Defendants' Opposition to Plaintiffs' Motion to Require Defendants to Give Their Beneficiaries Notice of Defendants' Continuing Inability or Refusal To Discharge Their Fiduciary Duties* was served by Electronic Case Filing, and on the following who is not registered for Electronic Case Filing, by facsimile:

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ELOUISE PEPION COBELL, et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:96CV01285
	)	(Judge Lamberth)
GALE NORTON, Secretary of the Interior, et al.,	)	
Defendants.	)	

ORDER

This matter comes before the Court on *Plaintiffs' Motion to Require Defendants to Give Their Beneficiaries Notice of Defendants' Continuing Inability or Refusal to Discharge Their Fiduciary Duties* [2746]. Upon consideration of the Motion, the responses thereto, and the record in this case, it is hereby

ORDERED that Plaintiffs' Motion is DENIED.

SO ORDERED.

Date: _____

_____
ROYCE C. LAMBERTH
United States District Judge

cc:

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